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Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSE ROBERTO ORTIZ,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

Whether reasonable suspicion that an automobile contains unlawful drugs permits officers to allow a dog into the cabin of the automobile to confirm or dispel their suspicion.

LIST OF PARTIES

Petitioner, Jose Roberto Ortiz, was the defendant in the Criminal Court of Davidson County Tennessee and appealed his conviction to the Court of Criminal Appeals where his conviction was affirmed. Mr. Ortiz then petitioned the Supreme Court of Tennessee for discretionary review of the decision of the Court of Criminal Appeals. Respondent, the State of Tennessee, was the plaintiff in the Criminal Court, the appellee in the Criminal Court of Appeals and the respondent in the Supreme Court of Tennessee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Tennessee entered in this case December 30, 1999.

OPINIONS BELOW

The order of the Criminal Court denying the Petitioner's motion to suppress illegally obtained evidence is set forth at A. 38a.[1] The judgment of the Criminal Court is set forth at A. 35a. The opinion of the Court of Criminal Appeals is set forth at A. 1a. The order of the Supreme Court of Tennessee denying permission to appeal is set forth at A. 41a.

JURISDICTION

The judgment of the Criminal Court was entered on December 2, 1997. A. 35a. The judgment of the Court of Criminal Appeals was entered on December 30, 1999. A. 1a. The order of the Supreme of Tennessee denying Mr. Ortiz's application for permission to appeal was entered on September 25, 2000. A. 41a. This Court has jurisdiction pursuant to 28 U. S. C. § 1257.

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[1] "A" designates the appendix attached to this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, the limitations of which are extended to state officials through Section One of the Fourteenth Amendment, prescribes limits on the investigatory techniques of officers who seize citizens. The Fourth Amendment is set forth in the Appendix at A. 42a.[2] Section One of the Fourteenth Amendment is set forth at A. 42a.

STATEMENT

A. Factual and Procedural Background

Officers from the Metropolitan Davidson County Drug Task Force received information from a confidential informant that "Mr. [Jose Roberto] Ortiz was due in town — either that night or the next day, didn't know for sure when, and that he should have a load of marijuana with him." R. III, 63.[3] Metro officers staked out the condominium of Otis Deck in the neighboring town of Hendersonville as Ortiz was known to have stayed with Deck on a previous visit to the Nashville area. R. III, 63.

Ortiz was observed to arrive at the condominium in Hendersonville in a car rented to him at the Memphis International Airport. R. III, 64. Mr. Ortiz then took a large carry bag from his rented car into the condominium and then

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[2] "A." designates the Appendix to this Petition.

[3] The Record, designated by "R.", contains five volumes – the volume indicated by the Roman numeral.

took three cardboard boxes into the condominium. R. III, 67.

Later that night, Ortiz came out of the condominium with a duffel bag and placed it in a Bronco that belonged to Otis Deck and went back in the condominium. R. III, 68. Ortiz then came back out of the condominium, got in the Bronco and drove down Gallatin Road which leads from the neighboring town of Hendersonville into Metropolitan Davidson County. R. III, 72. Officers following him noted that he had broken no traffic laws and "looked like he was trying to be extra cautious." *Id.*

Officers pulled Mr. Ortiz over once he crossed into the jurisdiction of Nashville Davidson County. R. III, 98. The Court of Criminal Appeals found that the seizure of Mr. Ortiz and his vehicle was supported by reasonable suspicion that Mr. Ortiz's vehicle contained contraband. *State v. Ortiz*, No. M1998-00483-CCA-R3-CD, slip op. at 25-26; A. 28a.

Officers approached the car and requested consent to search. R. III, 99. Ortiz refused consent to search and stated that he wanted to talk to his lawyer. R. III, 99-100. At that point, a drug dog was called to the scene and the record very clearly indicates that the dog was allowed inside the Bronco where it first indicated the presence of drugs. As Sgt. James McWright testified at the suppression hearing:

> We called a drug K-9 to the scene. Officer Ron Sloan was close. He run the dog on the car, and the dog indicated on the — on the tote bag *in the back seat of the car*, at which time *we removed it*, checked it, and and there was almost ten pounds, five grams short of ten pounds of marijuana in it.

R. III, 73 (emphasis added); A. 44a.

Officer McWright further testified at trial as follows:

Q: After you checked his license, then what did you do?

A: Called a K-9 to the scene, Officer Ron Sloan responded with his K-9 Morgan, and asked him to do a search of the vehicle.

Q: And then what happened?

A: Based on an indication by the drug dog, the dog alerted on the red bag that was in the back — the backseat of the Bronco, I opened the bag and observed 10 one — approximately one-pound bags of marijuana. . . .

R. IV, 98-99; 47a.

Mr. Ortiz filed a motion to suppress the contraband discovered in the duffel bag and the Criminal Court of Davidson County denied the motion. R. I, 13-14; 18-20; A. 38a. The defendant was then tried for possession of marijuana with the intent to distribute, found guilty by the Circuit Court and sentenced. R. I, 42. Ortiz appealed the conviction to the Court of Criminal Appeals of Tennessee claiming that evidence seized in the Bronco was unconstitutionally admitted at his trial. A. 2a. The Court of Criminal Appeals affirmed the judgment of the Criminal Court and the Supreme Court of Tennessee denied Ortiz's application for permission to appeal. A. 34a.

B. The Opinion of the Court of Criminal Appeals.

The Court of Criminal Appeals found that the stop of the Bronco was supported by reasonable suspicion. *Ortiz*, slip op. at 25; A. 28a. The informant's tip and the officer's observations of Mr. Ortiz reasonably provided sufficient suspicion for an investigative detention. Slip op. at 25-26; A. 28a.

The Court found that Sgt. McWright's testimony revealed that the dog indicated on the car and the duffel bag inside the car. Slip op. at 16 n.3; A. 17a n.3. The Court concluded that the dog first indicated on the exterior of the car. *Id.* No support can be found in the record for this factual conclusion — the entirety of Sgt. McWright's testimony on this issue is produced above in the Factual and Procedural Background. His testimony clearly demonstrates the dog indicated only on the "red bag that was in the back — the backseat of the Bronco." R. IV, 98.

The Court considered "the public interest at stake, the interdiction of a drug transaction, to be a substantial interest warranting the brief detention of the Ford Bronco and the use of the drug detection dog." Slip op. at 26; A. 28a. The question before this Court is therefore one that the Court has yet to answer: Whether the governmental interest in interdicting a drug transaction it reasonably suspects justifies placing a narcotics detection dog *inside* a vehicle where officers lack probable cause for a typical search of the car.

REASONS FOR GRANTING THE WRIT

This Court has suggested that a dog sniff of the exterior of an automobile is neither a search nor a seizure. *Indianapolis v. Edmond*, 121 S. Ct. 447 (2000). This Court has yet to address whether a dog sniff may be performed on the interior of an automobile without probable cause. The instant case raises the question of whether reasonable suspicion that drugs are present in a vehicle is a sufficient prerequisite to a dog sniff of the vehicle's interior.

The logical extension of this Court's doctrine on dog sniffs leads to a conflict with the logical extension of this Court's limits on police physical manipulation of property without probable cause. This Court has held that dog sniffs themselves are less intrusive than a search by human agents for drugs. *United States v. Place*, 472 U. S. 696, 707 (1983). A dog's entry into an automobile to determine whether a suspected container contains drugs is therefore a less substantial intrusion into the motorist's privacy than an officer's opening the container. And, as the dog indicates only on the presence of narcotics — as opposed to weapons, untaxed liquor, or other contraband or evidence of a crime — the dog sniff in the interior of the vehicle is limited to confirming as dispelling the present of contraband. When officers have reasonable suspicion that drugs are present in a container in a vehicle, this Court's doctrines on dog sniffs, which emphasize the limited (or even non-existent) intrusion of a dog sniff, seem to permit a dog's entry into a vehicle to confirm or dispel an officer's suspicion that drugs are present.

To the contrary, this Court's doctrines forbid physical intrusions of any kind on a citizen or his property absent a probable cause or reasonable suspicion that the citizen is armed

and presents a danger to the officer. *Bond v. United States,* 120 S. Ct. 1462 (2000); *Arizona v. Hicks* 480 U. S. 321 (1986); *Terry v. Ohio*, 392 U.S. 1 (1968). A dog sniff on the exterior of an automobile based on an officer's reasonable suspicion that the motorist is in possession of drugs does not offend these doctrines as neither the dog nor its trainer physically touches the motorist or his property. Entry of a vehicle by an officer who has neither probable cause of criminal activity, nor reasonable suspicion that the motorist is armed, is contrary to the rule this Court announced in *Arizona v. Hicks*, *supra* and *Bond v. United States, supra.* The question yet unanswered — and posed by this case — is whether *Bond* and *Hicks* apply to a physical intrusion by a canine narcotics officer whose only action inside the suspect's vehicle will be a positive alert to the presence of contraband.

I. One Strain of this Court's Authority Permits a Drug Dog to Enter an Automobile Suspected of Transporting Drugs

A dog sniff based on reasonable suspicion that drugs are present — of either the interior or exterior of a vehicle — confirms or dispels an officer's suspicion in a manner that reveals only whether narcotics are in fact present. Indeed, the dog sniff, even of an automobile's interior may be "the least intrusive means reasonably available to confirm or dispel the officer's suspicion in a short period of time." *Florida v. Royer,* 460 U. S. 496, 500 (1983).

A seizure is permitted if an officer reasonably suspects that a citizen is engaged in criminal activity. *Alabama v. White*, 496 U. S. 325 (1991); *Terry*, 392 U.S. at 20. The officer may conduct a "brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining, more information." *Adams v. Williams*, 407, U.

S. 143, 146, (1972).

While detaining the citizen, he may "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 442, U. S. 873, 881 (1975). A dog sniff of a citizen's property is not a Fourth Amendment event so long as the officers have reasonable suspicion to believe the property contains contraband. *Place*, 462 U. S. at 707. So long as officers are legally justified in detaining the property, the dog sniff of the property is an investigative tool requiring no further suspicion. *Id.*

Allowing the dog to enter the automobile of a seized motorist reasonable suspected of transporting drugs is a less intrusive search of the container in the automobile than an inspection of the container the officer would perform. "[T]he sniff discloses only the presence or absence of narcotics, a contraband item." *Place*, 462 U. S. at 707. The entry of the dog into the automobile will reveal no more information than whether the motorist is in possession of drugs — the very suspicion the officer is entitled "verify or dispel." *Royer*, 460 U.S. at 500. A dog sniff of even the interior of an automobile therefore seems potentially consistent with this Court's doctrines on investigative seizures.

II. Another Strain of this Court's Authority Prohibits Physical Intrusions on a Suspects Person or Property without Probable Cause or Reasonable Suspicion that a Suspect is Armed.

A dog's physical intrusion into an automobile based alone on reasonable suspicion that drugs are present is an intrusion human officers would not be allowed to make. Only where an officer has probable cause — or reasonable suspicion that a citizen is armed and dangerous — is a physical intrusion permitted on a citizen or his property. A dog sniff of the interior of an automobile is therefore inconsistent with this Court's doctrines limiting the extent of physical intrusions officers may make absent probable cause.

In *Arizona v. Hicks*, 480 U. S. 321 (1987), this Court held that officers who were lawfully in a suspect's apartment could not move stereo components to record their serial numbers without probable cause to believe the components were stolen. *Id.* at 326. The information revealed by the serial numbers was either completely innocent or revealed that the stereo components had been stolen. Just as a dog sniff either reveals criminal possession or nothing at all, the information officers discovered by moving the components revealed criminal possession or nothing at all. No personal information is discovered by learning the order in which a manufacturer produced on electronic device in a citizens' home. The physical manipulation of the stereo components to perform a test that reveals either criminal possession or nothing of significance is, however, an unconstitutional search without probable cause. *Id.* at 325. "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.*

The Court in *Hicks* could find no reasons why such a search should be permitted to proceed on less than probable cause. *Id.* at 327-28. Opening a citizen's car door and allowing a dog within the car intrudes on the citizen's property to an even greater extent. The motorist has no assurance that the dog will not scratch, bite or otherwise harm his property.

In *Bond v. United States*, 120 S. Ct. 1462, 1465 (2000) this Court reaffirmed that physical manipulation of a citizen's property is unreasonable without probable cause of wrongdoing. In *Bond*, Border Patrol Agents squeezed the defendant's duffle bag in the overhead compartment of a Greyhound bus and discovered a brick-shaped object. *Id.* at 1463-64. This Court held that squeezing the bag constituted a search. *Id.* at 1465. Similarly in the instant case, physical manipulation of the defendant's property was required — the opening of his vehicle and the unleashing of a police dog within the vehicle — to detect the presence of drugs within the vehicle. This Court has yet to permit a physical intrusion on the defendant or his property to discover mere evidence of a crime without probable cause.

Terry v. Ohio, 392 U. S. 1 (1968) does, however, expressly permit a physical intrusion of a suspect who is the subject of an investigatory detention, but not under the circumstances of the instant case. A citizen may be seized but officers may not enter his property or search his person without probable cause unless reasonable suspicion exists to believe he is armed and possess a threat to the officer. The extent of this physical intrusion permitted upon reasonable suspicion that the suspect is armed is a frisk or pat-down and is limited to a search to protect the officer from "guns, knives, clubs, or other hidden instruments for the assault of the police officer" during the investigatory detention. *Id.* at 29. An officer similarly may pat-down the cabin of an automobile if he has reasonable suspicion

to believe that the seized motorist has a weapon in his car. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Again, however, this search was limited to detecting weapons. *Id.* Reasonable suspicion that the deliverer is armed merely permits a search to discover weapons.

A narcotics detection dog is not trained to detect the presence of weapons and the officers in the instant case did not testify that they had any reasons to suspect that Mr. Ortiz was armed. The lower court found that the officers had reasonable suspicion that Mr. Ortiz possessed drugs but did not have probable cause. *Ortiz*, slip op. at. 25-26; A.28a. The lower court has therefore created an exception to this Court's long-established that investigatory seizures do not permit physical intrusions to investigate possible criminal activity. This Court has expressly forbidden such intrusions by human agents and has yet to consider the exception carved by the lower court, physical intrusion by a canine officer.

III. The Intersection of This Court's Doctrines

The dog sniff of an interior of a motorist's car reveals less information than any other form of search inside the car. The dog will indicate nothing unless contraband is present — thus no privacy concerns are implicated. The dog's entry into the vehicle is, however, a physical entry into the defendant's property by an agent of the police — an intrusion that is no less frightening or humiliating because the police officer walks on four legs rather than two.

This issue in the instant case therefore presents a problem that scholars have very recently debated -- whether the prohibition of unreasonable searches in the Fourth Amendment protects dignity or privacy. *See* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure,* 93 Mich. L. Rev. 1016, 1016-17, 1060 (1995) (lamenting that Fourth Amendment doctrines seem to be driven by concerns of privacy to the exclusion of concerns for police harassment).

If the Fourth Amendment prohibition on unreasonable searches protects privacy alone, a dog's entry into a lawfully seized vehicle is reasonable as the dog will reveal no information the defendant has a right to exclude from official view. If unreasonable searches are unreasonable not merely because of what they might reveal, but because the intrusion itself is offensive, then the dog's entry into the automobile's interior without probable cause violates the spirit of the Fouth Amendment.

A police dog roaming through a citizen's automobile is objectionable not because of what the dogs might unearth but because of the serious humiliation, fright, and potential for property damaged created by his presence in the automobile. If

the Amendment protects citizens against insulting and frightening police tactics employed without adequate suspicion, irrespective of the ability of those tactics to reveal private information contained within one's "houses, papers, and effects," then a dog's entry without probable cause is unreasonable. If the Amendment protects citizen's from merely having private information exposed to the public view during an unlawful search then the dog's entry into the automobile is as reasonable as a dog sniff of a car's exterior. The Court has yet to explore the limits of a dog sniff and the instant case demonstrates that support for both the conclusion of the lower court and the argument of the defendant can be found in this Court's doctrine. Each position reflects competing notions of the purpose of this great Amendment. Given the tension between this Court's doctrines — a tension reflecting competing theories of the design of the Amendment — this Court should review the limits of police use of dog sniffs when reasonable suspicion alone exists.

IV. This Court's Recent Decisions Compel Rehearing By The Court of Criminal Appeals

Since the decision of the Court of Criminal Appeals in the instant case, two cases in this Court have suggested that the instant case should have been differently decided. In *Indianapolis v. Edmond,* 121 S. Ct. 1462 (2000), this Court found a drug interdiction roadblock to be unconstitutional. In this decision, this Court noted, for the first time, that a dog sniff of the *exterior* of an automobile is itself neither a search nor a seizure. *Id.* (page numbers not yet available). "An *exterior* sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics." *Id.* The Court's language suggests

that while this exterior search is acceptable - so long as the automobile is lawfully detained — a dog sniff of the vehicle's *interior* is not permitted whenever merely because authorities have lawfully seized an automobile. *Edmond* suggest, that is, that reasonable suspicion — though sufficient to seize an automobile — does not itself permit officers to allow a drug dog inside the seized vehicles.

Bond v. United States 120 S. Ct. 1462 (2000), also decided after the decision of the Court of Criminal Appeals holds that the governmental interest in interdicting drugs does not permit officers to physically manipulate a citizen's property without probable cause. Officers in the instant case opened the door of Mr. Ortiz's vehicle and allowed a drug dog to trample through it. The dog sniff of the *interior* of Mr. Ortiz's vehicle is unreasonable in light of this Court's reasoning in *Indianapolis v. Edmond*, supra - and *Bond v. United States*, *supra*. Neither case had been issued by this Court at the time the Court of Criminal Appeals rendered its decision. The Petitioner therefore requests that this Court review the constitutionality of a dog sniff of a car's interior or remand the matter to the Court of Criminal Appeals for reconsideration in light of the decisions of this Court issued since the decision of the Court of Criminal Appeals.

CONCLUSION

For the foregoing reasons certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE
AT NASHVILLE
MAY 1999 SESSION

STATE OF TENNESSEE
v.
JOSE ROBERTO ORTIZ

No. M1998-00483-CCA-R3-CD
Davidson County
Hon. Walter C. Kurtz, Judge

(Possession of Marijuana with Intent to Deliver)

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OPINION FILED December 30, 1999
AFFIRMED
NORMA McGEE OGLE, JUDGE

OPINION

The appellant, Jose Roberto Ortiz, appeals his conviction in the Davidson County Criminal Court of possession of marijuana with intent to deliver, a class E felony. The trial court imposed a sentence of fifteen months incarceration in the Davidson County Workhouse. On appeal, the appellant presents the following issues for our consideration:

1. Whether Article One, Section 7 of the Tennessee Constitution required the exclusion at trial of evidence seized by police in Davidson County pursuant to the warrantless stop and search of the Ford Bronco that the appellant was driving.

2. Whether state and federal constitutional prohibitions against unreasonable searches and seizures also required the exclusion at the appellant's trial of evidence seized pursuant to a subsequent warrantless search of the appellant's rented Dodge Intrepid, which was parked in the parking lot of an apartment complex in Sumner County.

Following a thorough review of the record, we affirm the judgment of the trial court.

I. Procedural Background

On August 1, 1996, a Davidson County Grand Jury indicted the appellant for one count of possession with intent to deliver not less than one half ounce nor more than ten pounds of marijuana. On September 25, 1996, the appellant filed a motion to suppress at trial the State's use of approximately ten

pounds of marijuana, which were the subject of the indictment and which were seized by police on February 23, 1996, following a warrantless stop and search of the appellant's vehicle, a Ford Bronco. On December 4, 1994, Judge J. Randall Wyatt, Jr., conducted a suppression hearing and denied the appellant's motion. Judge Wyatt concluded that the police possessed probable cause to stop the Ford Bronco and search the vehicle and also concluded that the police possessed probable cause to arrest the appellant at the time of the stop.[1]

Subsequently, the State notified the appellant that it also intended to introduce at trial, pursuant to Tenn. R. Evid 404 (b), the approximately fifty pounds of marijuana seized by the police soon after the appellant's arrest and as a result of the warrantless search of the appellant's rental car, a Dodge Intrepid, which was parked in the parking lot of an apartment complex in Sumner County. Accordingly, on September 29, 1997, the appellant filed a motion to suppress the State's use at trial of fifty pounds of marijuana. Judge Walter C. Kurtz conducted a suppression hearing on November 21, 1997, and denied the appellant's motion. Specifically, Judge Kurtz declined to revisit the appellant's prior motion to suppress and, with respect to the current motion, concluded that the police

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[1] Before the trial court, the State challenged the appellant's standing to contest the warrantless search of the Ford Bronco by the police, because the appellant did not own the vehicle. At the conclusion of the December 4, 1996 suppression hearing, Judge Wyatt found that the owner of the vehicle, Otis Deck, had given the appellant permission to drive his vehicle and accordingly concluded that the appellant possessed the requisite expectation of privacy. See. e. g., United States v. Pena, 961 F. 2d 333, 337 (2nd Cir. 1992); United States v. Best, 135 F. 3d 1223, 1225, (8th Cir 1998); United States v. Orrego-Fernandez, 78 F. 3d 1497, 1502 (10th Cir. 1996). On appeal, the State does not dispute the appellant's standing.

possessed probable cause to search the Dodge Intrepid for contraband.

The appellant's case proceeded to trial on December 1, 1997. The State introduced at trial both the ten pounds of marijuana seized from the Ford Bronco when the appellant was stopped by police in Davidson County and the fifty pounds of marijuana seized by police soon thereafter from the Dodge Intrepid parked in Sumner County. The appellant declined to present any proof. Following deliberation, the jury returned a guilty verdict.

II. Factual Background

Preliminarily we note that, in his reply brief, the appellant adopts the position that this court, in evaluating the correctness of the trial court's ruling on a pretrial motion to suppress, may only review evidence introduced at the hearing on the disputed motion. In light of our supreme court's decision in State v. Henning, 975 S.W.2d 290, 299 (Tenn 1998), we disagree. The court in Henning observed that the primary purpose of the exclusionary rule is to deter police misconduct and concluded:

> Suppressing evidence *lawfully seized* simply because the legality of the seizure was established by proof introduced at trial, rather than proof introduced at the suppressions hearing, in no way furthers the purpose of the rule and could perhaps be inimical to prudent law enforcement practices.

Id. (emphasis in original). The court's reasoning applies equally to proof introduced at a subsequent suppression hearing. Accordingly, in summarizing the relevant facts on appeal, we have drawn upon the entire record of proceedings.

James McWright, a sergeant employed by the Nashville

Metropolitan Police Department, testified on behalf of the State at both suppression hearings and at the appellant's trial. He testified that he had been a narcotics officer for approximately twenty-one or twenty-two years and was currently assigned to the Twentieth Judicial District Drug Task Force. Officer McWright recounted that, in early February 1996, a confidential informant contacted him concerning the appellant. Officer McWright was familiar with this informant, having received information from the informant on at least three prior occasions within the preceding two years, which information had resulted in arrests, the seizure of drugs and money, and convictions in the Davidson County Criminal Court. He had also received information from this informant on several other occasions. Officer McWright asserted that, although the information provided on these additional occasions had not always led to arrests, the information had always "panned out."

With respect to this case, the informant told Officer McWright that the appellant had arrived in Nashville from Texas, had been in a local bar with a man named Otis Deck, and was "moving a lot of weight in marijuana." The informant provided the appellant's first name, "Bob" or "Bobby," and further described the appellant as a Mexican and as a "big man." According to the informant, the appellant was staying with Mr. Deck in Hendersonville in Sumner County, and both the appellant and Mr. Deck were engaged in drug transactions at the barbecue restaurant on "North First and Cleveland Street." The informant additionally indicated that the appellant sometimes used rental cars as a mode of transportation and also used Mr. Deck's Ford Bronco to deliver marijuana to customers in Davidson County.

Upon receiving this information, Officer McWright initiated surveillance of Mr. Deck's residence, an apartment in Hendersonville. Mr, Deck's apartment had a car port or "open garage area" in which Mr. Deck parked his Ford Bronco.

Additionally, there were other uncovered parking spaces available to visitors of the apartment complex. The police observed a Ford Thunderbird parked in an uncovered parking space in front of Mr. Deck's apartment and investigated the license plate number. They discovered that the car was registered to Hertz Rent A Car and had been rented at the Nashville Airport to "Roberto Ortiz" from Robstown, Texas. Officer McWright testified that he was familiar with the appellant's name, because the appellant was an associate of Jose Garcia, a large-scale drug dealer. In 1993 or 1994, the police had investigated Mr. Garcia, who was importing large quantities of marijuana into Davidson County. Mr. Garcia was ultimately arrested and convicted or drug-related charges in 1994 or 1995, and, at the time of he appellant's offense, was serving his sentence in a federal penitentiary.

On the occasion of the informant's first communication, the police also observed the appellant driving Mr. Deck's Ford Bronco. Officer McWright followed the appellant into a Shoney's restaurant for the purpose of obtaining "a real good look at him." The police did not, however, observe any illegal or suspicious activity and the appellant ultimately departed the Nashville area without incident.

On February 23, 1996, the same informant again contacted Officer McWright and told his that "Bobby was coming to town and he was going to have a load of marijuana with him." The informant indicated that the appellant would arrive either that same evening or on the next day, but was apparently unaware of the appellant's mode of transportation. Officer McWright therefore instructed officers to investigate incoming flights at the Nashville Airport. Upon establishing that the appellant was not listed as a passenger on any incoming flight, Officer McWright and members of the drug task forces of the Twentieth and the Eighteenth Judicial District again initiated surveillance of Mr. Deck's residence.

That evening, the police observed Mr. Deck drive in his Ford Bronco to a restaurant, where he met with a woman. Mr. Deck and his companion returned to Mr. Deck's residence at approximately 8:00 p.m. They were driving separate vehicles, and the police ascertained that the woman's vehicle was registered to Kimberly State, the ex-wife of Jamie State, known drug dealer. At 8:35 p.m., the police observed the appellant arrive at Mr. Deck's residence in a 1996 Dodge Intrepid. An investigation of the license plate number revealed that the car was a rental vehicle and had been rented to the appellant on Airport Drive in Memphis, Tennessee.

Upon his arrival at Mr. Deck's residence, the appellant got out of his rental car, retrieved a large black or dark blue bag from the back seat of his vehicle, and carried the bag into Mr. Deck's residence. Ms. Slate departed in her own vehicle twenty minutes later. At 9:40 p.m., the appellant reemerged from Mr. Deck's residence, moved his rental car to an uncovered, visitor's parking space closer to Mr. Deck's residence, and retrieved a box from the trunk of the rental car. The box was white box with pictures of toys on it. There were several other similar boxes in the trunk. The appellant carried the box into Mr. Deck's residence. Ten minutes later, the appellant reemerged with a red duffel bag, which he placed behind the front passenger seat of the Ford Bronco. After locking the Ford Bronco, the appellant returned inside Mr. Deck's residence once again. Several minutes later, the appellant carried the white box out of the residence and replaced the in the trunk of the Dodge Intrepid. After ensuring that both the Ford Bronco and the Dodge Intrepid were securely locked, the appellant again returned inside. Shortly thereafter, the appellant came outside and walked slowly around the Ford Bronco, examining the vehicle. Finally, he went back inside Mr. Deck's residence before reemerging once again, getting into the Ford Bronco, and driving toward Davidson County.

While two officers remained at Mr. Deck's residence to continue surveillance, Officer McWright and several other police officers followed the appellant into Davidson County. Officer McWright recalled that the appellant was driving "going slower than anybody on the road." Specifically, the appellant was driving thirty or thirty-five miles per hour in a forty-five mile per hour zone. The flow of traffic was proceeding at fifty or fifty-five miles per hour. The appellant "looked like he was trying to be extra careful, extra cautious." Officer McWright testified:

> ...[T]he flow of traffic was breezing right on by him. And to my way of thinking, and I think anyone else, if somebody is going that slow, it's usually a little old gray-haired lady or somebody that definitely don't want to be stopped, because they've got contraband in the car. That's my feelings on it.

As soon as the appellant crossed the county line into Davidson County, Officer McWright instructed police officers in another patrol car to stop the appellant's vehicle. Officer McWright testified that he believed that he "had reasonable suspicion to stop [the appellant] and talk to him." The officer explained:

> And based on the information that we had that he used Mr. Deck's vehicle to make deliveries of the marijuana, and he made deliveries in the Nashville area once he crossed the county line. And based on the information we had, I had a patrol car stop him.

Once the appellant's vehicle had been stopped, Officer McWright approached the appellant and informed the appellant that he had reason to believe that the Ford Bronco contained marijuana. Officer McWright requested permission to search

the Ford Bronco, whereupon the appellant refused permission and also informed Officer McWright that he wished to speak with an attorney. Officer McWright testified that, at this point, "there was no doubt in [his] mind" that he possessed probable cause. However, rather than search the car, the officer contacted a nearby K-9 officer and instructed him to come to the location of the appellant's stopped car. When the K-9 officer arrived, the drug detection dog "indicated on the vehicle, and indicated on the bag that was in the vehicle."

Upon searching the bag, the police discovered just under ten pounds of marijuana. Officer McWright testified that the packets of marijuana in the bag were 'heat shrinked" or vacuum-packed. He explained:

> [I]t had been packaged in a very unusual manner to try to prevent the detection by a drug canine. When it is packaged for shipping and to try to mask the odor of the marijuana itself, it was heat shrinked in plastic.
>
> * * *
>
> It means to me that the [the appellant] was on his way to deliver ten pounds of marijuana. That he was a major drug dealer.

The police arrested that appellant and transported him to jail.

Officer McWright was in fact unsure concerning the precise moment at which the appellant was officially placed under arrest. However, he testified, "When I run a dog on a car, and I've got somebody outside of the vehicle;...I consider them under arrest." The appellant testified at the December 4, 1996 suppression hearing that, upon refusing consent to the search of the Ford Bronco, he was informed that he was under arrest and was placed in a patrol car.

In any event, following the appellant's arrest and the

discovery of the ten pounds of marijuana, Officer McWright returned to Mr. Deck's residence, where the appellant's Dodge Intrepid was still parked in the parking lot. Mr. Deck consented to the search of his residence, and the police located the keys to the Dodge Intrepid in a gas grill in Mr. Deck's car port. Before searching the Intrepid, the police employed two drug detection dogs to smell the outside of the rented vehicle. The two dogs positively indicated the presence of narcotics in the trunk area of the vehicle. The police then unlocked the trunk and opened the boxes inside the trunk. The boxes contained approximately fifty pounds of marijuana.

III. Analysis

a. The Stop and Search of the Ford Bronco

I. The Appellant's Claim

Citing our supreme court's decision in State v. Jacumin, 778 S. W. 2d 430 (Tenn 1989), the appellant initially claims that the stop of the Ford Bronco, his arrest, and the search of the Ford Bronco violated Article I, Section 7 of the Tennessee Constitution. Specifically, the appellant asserts that the police acted without probable cause to believe that he was engaged in criminal conduct. According to the appellant, the police relied upon a communication or tip from a confidential informant that failed to satisfy the so-called Aguilar-Spinelli standard retained by the court in Jacumin. Id. At 436. The appellant concludes that the ten pounds of marijuana seized by police during the search of the Ford Bronco were subject to the exclusionary rule. The State responds that the police, in fact, conducted a brief investigatory detention requiring only a reasonable suspicion of criminal activity. Delaware v. Prouse, 440 U. S. 648, 663, 99 S. Ct. 1391, 1401, (1979); Terry v. Ohio, 392 U. S. 1, 21, 88 S. Ct. 1868, 1880 (1968). See also State v. Yeargan, 958 S. W. 2d 626, 630-632 (Tenn 1997). Moreover, the State argues that the

officer's use of a drug detection dog, resulting in the discovery of the marijuana did not exceed the permissible scope of a Terry stop.

II. Theories Potentially Justifying Admission of the Ten Pounds of Marijuana

Both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution protect citizens against unreasonable searches and seizures conducted by law enforcement officers. Under both the United States and Tennessee constitutions, courts have generally defined unreasonable searches and seizures as those conducted without a warrant, a definition subject to a few carefully defined exceptions. See State v. Keith, 978 S.W.2d 861, 865 (Tenn 1998); Yeargan, 958 S. W. 2d at 629. See also Maryland v. Dyson, __ U. S. ___,___, 119 S. Ct. 2013, 2014, (1999). The constitutional prohibitions against unreasonable searches and seizures and the accompanying warrant requirement encompass stops and searches of automobiles. Id. See also State v. Pulley, 863 S. W. 2d 29, 30 (Tenn 1993). Accordingly, when the State seeks to introduce in a criminal trial evidence obtained as a result of the warrantless stop and search of an automobile, the State carries the burden of demonstrating by a preponderance of the evidence the applicability of one of the exceptions to the warrant requirement. Keith, 978 S. W. 2d at 865; Yeargan, 958 S. W. 2d at 629.

In this case, there are three potential theories justifying the admission at the appellant's trial of the ten pounds of marijuana seized by police from the Ford Bronco. The first two theories relate to the State's argument at the suppression hearing that, at the time of the stop of the Ford bronco, the police possessed probable cause to believe that the appellant was transporting marijuana for the purpose of sale or delivery.

First, in Carroll v. United States, 267 U. S. 132, 149, 45 S. Ct. 280, 283-284 (1925), the United States Supreme Court set forth the "automobile exception" to the warrant requirement, holding that police may stop and search an automobile without a warrant if the law enforcement officers have probable cause to believe that the automobile contains contraband. The rationale for the automobile exception is two-fold: (1) the impracticability of obtaining a search warrant in light of the inherent mobility of an automobile; and (2) the reduced expectation of privacy with respect to one's automobile. California v. Carney, 471 U. S. 386, 393, 105 S. Ct. 2066, 2070 (1985); South Dakota v. Opperman, 428 U. S. 364, 367 96 S. Ct. 3092, 3096 (1976). See also State v. Leveye, 796 S. W. 2d 948, 951 (Tenn 1990). Since Carroll, the Supreme Court has extended this exception to include the search of containers within an automobile capable of concealing the object of the search. United States v. Ross, 456 U. S. 798, 824, 102 S. Ct. 2157, 2172 (1982). See also Wyoming v. Houghton, 526 U. S. 295, ___, 119 S. Ct. 1297, 1304 (1999). Moreover, in California v. Acevedo, 500 U. S. 565, 576, 111 S. Ct. 1982, 1989, (1991), the Court held that the automobile exception encompasses those circumstances in which probable cause extends only to a specific container within an automobile. Accordingly, if the police in this case possessed probable cause to believe that the red duffel bag placed by the appellant into the Ford Bronco contained marijuana, the police possessed authority to stop the Bronco and search the bag.

In the context of applying the automobile exception, the questions of the timing of the appellant's arrest and the validity of the appellant's arrest are not necessarily determinative or even relevant. See, e.g., Chambers v. Maroney, 399 U. S. 42, 27 n. 6, 52, 90 S. Ct. 1975, 1979 n. 6. 1981 (1970); Carroll, 267 U. S. at 158-159, 45 S. Ct. At 287. In contrast, pinpointing the moment of the appellant's arrest and ascertaining the legality of

the arrest are critical if the search of the automobile is to be characterized as incidental to the appellant's arrest, the second theory potentially justifying the admission at trial of the disputed evidence. See State v. Crutcher, 989 S. W. 2d 295, 301 (Tenn 1999). Under this theory, if the police possessed probable cause to believe that the appellant was transporting marijuana for the purpose of sale or delivery, the police possessed the authority to stop the Ford Bronco and arrest the appellant. Beck v. Ohio, 379 U. S. 89, 91, 85 S. Ct. 223, 225 (1964), Henning, 975 S. W. 2d at 300. See also Tenn Code Ann.§ 40-7-103 (a) (1997) (Tennessee limits to felony offenses a police officer's authority to conduct a warrantless arrest for a crime committed outside his presence). If the police did in fact arrest the appellant, the police then possessed the authority to conduct a search of the passenger compartment of the automobile, including the red duffel bag. New York v. Belton, 453 U. S. 454, 460, 101 S. Ct. 2860, 2864 (1981); Chimel v. United States, 395 U. S. 752, 763, 89 S. Ct. 2034, 2040 (1969).

Of course, if the police officers possessed probable cause to believe that the appellant was transporting narcotics for sale or delivery, the State may rely upon the automobile exception to the warrant requirement without regard to the timing or legality of the appellant's arrest. In any event, assuming probable cause justifying an arrest, undisputed testimony at trial established that, upon the appellant's refusal to consent to the search of the Ford Bronco and prior to the use of the drug detection dog and the search of the red duffel bag in the Ford Bronco the police informed the appellant that he was under arrest, asked him to get out of the Ford Bronco, and placed him briefly in the backseat of a patrol car.

This undisputed testimony poses some difficulty to the State's theory of admissibility on appeal, the third potential theory. As previously noted, the State argues on appeal that the stop of the Ford Bronco was a brief investigative detention

support by reasonable suspicion that the appellant was transporting or delivering marijuana. Prouse, 440 U. S. at 663, 99 S. Ct. At 1401; Terry, 392 U. S. at 21, 88 S. Ct. At 1880. See also Yeargan, 958 S. W. 2d at 630-632. Leaving aside for the moment the difficulty posed by the timing of the appellant's arrest, the appellant also argues that the State waived reliance upon this exception to the warrant requirement by failing to argue this exception before the trial court. The record does reflect that the State, at the suppression hearing, consistently maintained that the information possessed by the officers in this case exceeded the level of information required to establish reasonable suspicion, satisfying the more stringent probable cause standard. In this context, the State insisted that the admission of the disputed evidence was entirely consistent with this court's decision in State v. Coleman, 791, S. W. 2d 504 (Tenn. Crim. App. 1989), a case in which we addressed the application of the Aguilar-Spinelli test in evaluating an officer's reasonable suspicion to believe that a motorist was committing a crime. Similarly, although the trial court noted that Officer McWright had described his basis for the stop as reasonable suspicion, the court agreed with the State that the information possessed by police at the time of the stop furnished probable cause to believe that the appellant was transporting narcotics for sale or delivery. Nevertheless, in light of the primary purpose of the exclusionary rule, i.e., the deterrence of police misconduct, and this court's obligation to review de novo the trial court's application of the law at a suppression hearing, it is far from clear that the validity of the stop and search should turn upon the quality of the prosecutor's argument. Rather, "this court should be free to examine the validity of a search using any appropriate legal analysis where the record in this case permits us to do so." State v. Hearn, No. 01C01-9511-Cr-00377, 1997 WL 537089, at *2 (Tenn. Crim. App. at Nashville, September 2, 1997)(Smith, J., concurring).

Accordingly, if the police officers possessed a

reasonable suspicion that the appellant was committing a crime, the police could conduct a brief investigative detention of the Ford Bronco. However, an investigative detention that is reasonable at its inception may violate the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution "by virtue of its intolerable intensity and scope." Terry, 392 U. S. at 18-20, 88 S. Ct. At 1878-1879; State v. Simpson, 968 S. W. 2d 776, 783 (Tenn. 1998). As previously noted, if was undisputed at trial that, upon the appellant's refusal to consent to a search of the Ford Bronco, the police informed the appellant that he was under arrest, ordered the appellant to get out of the Ford Bronco, and placed him briefly in a patrol car. Our supreme court has noted:

> In Tennessee, an arrest is ... defined as the 'taking, seizing, or detaining of the person of another, either by touching or purring hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest.

Crutcher, 989 S. W. 2d at 301. According to this definition, if the stop of the Ford Bronco is characterized as a brief investigative detention support by reasonable suspicion, the detention soon escalated into an exceeding the scope of the circumstances justifying the initial intrusion.[2]

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[2] The issue of whether an arrest was made, for Fourth Amendment purposes, is primarily one of fact. Crutcher, 989 S. W. 2d at 299. This court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise. Id. In this case, the trial court at the suppression hearing declined to explicitly find at what point the appellant was placed under arrest. This omission as due in large part to the court's reliance upon the automobile exception to the warrant requirement in admitting the disputed evidence.

However, even assuming that the police possessed a reasonable suspicion rather than probable cause to stop the Ford Bronco, we do not believe that the subsequent, illegal arrest required application of the exclusionary rule in this case. The exclusionary rule operates to bat the admissibility of evidence directly or derivatively obtained from an illegal arrest. Wong Sun v. United States, 371 U. S. 471, 483-488, 83 S. Ct. 407, 416-417 (1963). However, evidence obtained by means genuinely independent of the constitutional violation is not subject to the exclusionary rule. Id. This rule is commonly referred to as the "independent source doctrine" and "rests upon the policy that, "while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.'" State v. Clark 844 S. W. 2d 597, 600 (Tenn 1992) (citation omitted). See also State v. Ware, No. 01C01-9803-CC-00129, 1999 WL 378341, at *5 (Tenn. Crim. App. at Nashville, June 11, 1999).

We conclude that the use of the drug detection dog and

The trial court did, however, feel it necessary to opine that the police officers possessed probable cause to arrest the appellant at the time of the stop. Moreover, as noted earlier, undisputed testimony reflects that the appellant was placed under arrest upon refusing consent to a search of the Ford Bronco. Indeed, Officer McWright testified that he believed that the appellant was under arrest prior to the use of the drug detection dog. However, the subjective intentions of police officers are irrelevant in determining whether an arrest has been effectuated. State v. Johnson, 980 S. W. 2d 414, 422 (Tenn. Crim. App. 1998). Nevertheless, as noted above, application of the standard set forth in Crutcher reflects the occurrence of an arrest prior to the use of the drug detection dog.

the consequent discovery of the marijuana was "genuinely independent" of any constitutional violation, that is the possibly illegal arrest of the appellant. In other words, assuming reasonable suspicion, the appellant's brief detention and the officers' use of the drug detection dog were entirely consistent with the circumstances justifying the initial intrusion and could have occurred with or without the appellant's formal arrest. We have previously held that "[a] sweep of the outside of a vehicle by a trained drug detection dog does not constitute a search for Fourth Amendment purposes, but is a legitimate investigative technique." State v. England, No. 01C01-9702-CR-00064, 1998 WL 155584, at *4 (Tenn. Crim. App. at Nashville, March 31, 1998), perm. to appeal granted. (Tenn 1999) (citing United States v. Place, 462 U. S. 696, 707, 103 S. Ct. 2637, 2645 (1983). See also State v. Price, No. 02C01-9610-CC-00356, 1997 WL 503073, at *5 (Tenn. Crim. App. at Jackson, August 25, 1997), perm. to appeal denied, (Tenn 1998). Moreover, the positive indication by the dog in this case would provide the necessary probable cause to search the interior of the vehicle pursuant to the automobile exception to the warrant requirement. Id.[3] Accordingly, precluding the admission of the marijuana in this case, which was not the result of any police misconduct, would certainly not serve the purpose of the exclusionary rule to deter police misconduct and would place the government in a worse position that it otherwise would have occupied.

The admissibility of the marijuana in this case,

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[3] The appellant argues that the drug detection dog was allowed to sniff inside the Ford Bronco prior to giving any positive indication to the police. The appellant's characterization of the proof contained in the record is directly contradicted by Officer McWright's testimony that the dog "indicated" both on the car *end* on the duffel bag inside the car.

therefore, depends upon whether the police possessed either a reasonable suspicion or probable cause to believe that the appellant was transporting narcotics for delivery or sale at the time of the stop of the Ford Bronco. Both determinations must be made in the light of our supreme court's decision in State v. Jacumin, 778 S. W. 2d at 436, in which the court addressed the appropriate standard by which to evaluate the adequacy of a search warrant supported by information from a confidential informant. The Jacumin analysis is equally applicable in the context of cases, such as the one currently before this court, involving warrantless searches and seizures. See e.g., State v. Bridges, 963 S. W. 2d 487, 491-492 (Tenn. 1997); State v. Marshall, 870 S. W. 2d 532, 538-539 (Tenn. Crim. App. 1993), overruled on other grounds, State v. Carter, 988 S. W. 2d 145 (Tenn, 1999). Moreover, Tennessee courts have noted the utility of the analysis in the context of evaluating an officer's claim of reasonable suspicion. See, e.g., Simpson, 968 S. W. 2d at 781; Bridges, 963 S. W. 2d at 491-491; Pulley, 863 S. W. 2d at 32-34.

III. Probable Cause

With respect to both probable cause and reasonable suspicion, the United States Supreme Court has observed.

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Ornelas v. United States, 517 U. S. 690, 695, 116 S. Ct. 1657, 1661 (1996) (citations omitted). See also Keith, 978 S. W. 2d at 867. Our supreme court has observed generally that probable cause "must be more than mere suspicion...but neither must be

absolute certainty..." Yeargan, 958 S. W. 2d at 637. In the context of this case, probable cause was established in the facts and circumstances within the knowledge of the officers and of which they possessed reasonable trustworthy information were sufficient to warrant a prudent person in believing that the appellant was transporting marijuana in the Ford Bronco for the purpose of sale or delivery. Id.

Again, our supreme court in Jacumin clarified the standard reviewing court must apply in determining whether an informant's communication or tip is "reasonably trustworthy information." The court rejected the United States Supreme Court's adoption in Illinois v. Gates, 462 U. S. 231, 103 S. Ct. 2317 (1983), of a totality of the circumstances standard and choose instead to retain the so-called Aguilar-Spinelli standard. Jacumin, 778 S. W. 2d at 436. This standard was first articulated by the Supreme Court in Aguilar v. Texas 378 U. S. 108, 114, 84 S. Ct. 1509, 1514 (1964), and requires a showing of (1) the basis of the informant's knowledge and (2) indicia of veracity reflecting either (a) the credibility of the informant or (b) the reliability of the informant's information. See State v. Ballard, 836 S. W. 2d 560, 562 (Tenn. 1992). Any deficiency in either prong of the Aguilar-Spinelli standard may be overcome by independent police corroboration. Marshall, 870 S. W. 2d at 538-539. In this regard, the Supreme Court in Spinelli v. United States, 393 U. S. 410, 415, 89 S. Ct. 584, 588 (1969), suggested the following framework of analysis:

1. Does the informant's tip by itself pass the Aguilar-Spinelli tests?

2. If not, is there independent police corroboration?

3. If there is corroboration, "[c]an it fairly be said that the [corroborated] tip...is as trustworthy as a tip which would pass Aguilar's test without independent corroboration?"

Before applying the Aguilar-Spinelli standard, we wish to emphasis that the standard is only relevant if the informant's communication is essential to a finding of probable cause. In other words, as Professor LaFave has observed in his treatise on the law of search and seizure,

> "[w]here information from an informer has stimulated a police investigation which has subsequently developed beyond mere corroboration to a showing of probable cause entirely apart from informant's communication, ... inquiry into the information's content, source, and basis is unwarranted."

Wayne R. LaFave, 2 Search and Seizure, § 3.3 (f), at 180 (3d ed. 1996)(citation omitted). We do not believe that in this case, the police investigation produced a showing of probable cause entirely independent of the informant's communication.

Turning, therefore to the framework of analysis set forth in Spinelli, 393 U. S. at 415, 89 S.Ct. at 588, we conclude that the informant's tip by itself fails the Aguilar-Spinelli standard. With respect to the "credibility" prong, we have already noted that the informant in the present case had assisted Officer McWright on at least three prior occasions on which he had provided information leading to arrests, the seizure of drugs and money, and convictions in the Davidson County Criminal Court. Moreover, Officer McWright testified that the informant's communications on other occasions had also

"panned out," although not necessarily leading to arrests. These facts sufficiently demonstrate the informant's credibility. See Bridges, 963 S. W. 2d at 491; State v. Lowe, 949 S. W. 2d 300, 305 (Tenn. Crim. App. 1996). Compare State v. Emerson, no 02C01-9312-CC-00276, 1998 WL 106225, at *6 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1998).

However, the informant's communication does not reveal the basis of his knowledge, that is how the informant knew that the appellant was importing marijuana into Davidson County. The tip contained neither an explicit statement describing the basis of the informant's knowledge nor sufficient detail to suggest reliance upon "something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli, 393 U. S. 416, 89 S. Ct. at 589. Indeed, the State on appeal does not contest the deficiency of the informant's tip in this regard.

Nevertheless, our supreme court has observed that,

> where a tip fails under either or both of the two prongs, probable cause may still be established by independent police investigative work that corroborates the tip to such an extent that it supports the inference that the informant was reliable and that the informant made the charge on the basis of information obtained in a reliable way.

Bridges, 963 S.W.2d at 493. In State v. Moon, 841 S.W.2d 336 (Tenn. Crim. App. 1992), this court explored the necessary quantity and quality of corroborating information in the context of an informant's tip that, by itself, possessed insufficient; indicia of veracity. The court quoted Professor LaFave for the following proposition:

> "[I]t is not necessary that the events observed by the police supply the probable cause by themselves or that they point unequivocally in the direction of guilt. It is sufficient that they are 'unusual and inviting explanation,' through 'as consistent with innocent as with criminal activity,' Thus, when an untested informant says that he has seen horse race bets taken at a steel plant and then passed through the fence to defendant, police observation of packages being passed to the defendant on several occasions 'was sufficient to establish the reliability of the informer in this instance.' Similarly, where an informer said narcotics were being sold in a certain record shop and that he had purchased narcotics and seen others there, this was adequately corroborated by a half hour surveillance of the shop resulting in 'personal observation of known narcotic addicts entering the premises, speaking with a clerk, going to the rear of the store and then exiting with no apparent purchase."

Id. at 341. See Wayne R. LaFave, 2 Search and Seizure, § at 168-169 (3d ed. 1996). In State v. Marshall, 870 S. W. 2d at 539, also a case involving a deficient showing of veracity, we further emphasized that the police need not corroborate incriminating details in order to satisfy the Aguilar-Spinelli standard. Corroboration of seemingly innocent details may suffice. Id. In any event, we noted in Marshall that terms such as "incriminating," "suspicious," "innocent," and "non-suspect" are not employed in a vacuum but in the context of the facts and circumstances of a particular case. Id..

These cases leave unanswered the question of whether the quantity or quality of corroboration necessary to cure a deficiency in the veracity prong is the same as that necessary to cure a deficiency in the basis of knowledge prong. Justice White's concurring opinion in Illinois v. Gates, suggests not.

The Supreme Court's decision in Gates, 462 U. S. at 272, 103 S. Ct. at 2350, addressed an informant's tip that was by itself deficient with respect to *both* the veracity and basis of knowledge prongs of the Aguilar - Spinelli standard. Justice White agreed with the majority's conclusion that the disputed evidence was admissible at the Gates' trial, but criticized the majority's abandonment of the Aguilar-Spinelli standard. Id. at 267, 2348. Justice White opined that the informant's communication in conjunction with police corroboration satisfied the now abandoned standard. Id. In reaching this conclusion, Justice White necessarily acknowledged that, as in the case of an informant's tip that does not possess sufficient indicia of veracity, an inadequate showing of the informant's basis of knowledge may be cured by independent corroboration of certain details in the tip. Id. At 270 n. 22, 2349, n. 22. Yet Justice White cautioned:

> My concern...is...that [the basis of knowledge] prong might be deemed satisfied on the basis of corroboration of information that does not in any way suggest that the informant had an adequate basis of knowledge for his report. If, however, ...the police corroborate information from which is can be inferred that the informant's tip was grounded on inside information, this corroboration is sufficient to satisfy the "basis of knowledge" prong.

Thus, Justice White emphasized that the informant in Gates possessed specific knowledge of the defendant' "unusual travel plan," the accuracy of which was confirmed by independent police investigation. Id., at 271, 2350.[4]

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[4]As noted earlier, the Supreme Court in Spinelli, 393 U. S. at 416, 89 S. Ct. At 589, suggested that a tip containing sufficient-detail might itself pass the basis of knowledge prong of the Aguilar-Spinelli standard. Obviously, Justice White in Gates

In short, for the purpose of satisfying the basis of knowledge of prong of the Aguilar-Spinally standard, as opposed to the veracity prong, Justice White would require corroboration of details suggesting inside information, i.e., details not easily observed or known by anyone other than close associates of the suspect. As in the case of corroboration of the veracity prong, the corroborated details need not be incriminating. Thus Justice White observed in Gates

> Even...had the corroboration related only to completely innocuous activities, this fact alone would not preclude the issuance of a valid warrant [under the Aguilar-Spinelli standard]. The critical issue is not whether the activities observed by the police are innocent or suspicious. Instead, the proper focus should be on whether the actions of the suspects, whatever their nature, give rise to an inference that the informant is credible *and that he obtained his information in a reliable manner.*

Id. at 269, 2349 (emphasis added).

We finally note that, in criticizing Gates, our supreme court in Jacumin seemingly cited with approval Justice White's concurring opinion. Jacumin 778 S. W. 2d at 434. Indeed, Justice White's assertion, that the nature of the information that must be corroborated in order to demonstrate an adequate basis of knowledge is different from the nature of information which, when corroborated, may satisfy a deficient showing of veracity, is consistent with both his and our supreme court's rejection of the totality of circumstances approach.

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believed that the informant's specific knowledge of the Gates' unusual travel plans did not rise to that level.

In this case, the informant notified Officer McWright that the appellant was imparting substantial quantities of marijuana into Davidson County. In early February 1996, the informant accurately notified the police of the appellant's presence in the Nashville area. On February 23, 1996, the informant was able to predict the appellant's arrival in the Nashville area on that day, although he was apparently unable to provide details concerning the appellant's exact time of arrival and the appellant's mode of transportation. The informant described the appellant in very general, albeit fairly, accurate, terms as a "big man"[5] and as a Mexican" from Texas named "Bob" or "Bobby". Moreover, the informant was aware that the appellant would be staying with Mr. Deck in Hendersonville in Sumner County. He was aware that the appellant would be driving Mr. Deck's Ford Bronco and would also be driving rental cars. Reviewing this information, we must conclude that, while independent police corroboration of this information might satisfy any deficiency in the veracity prong of the Aguilar-Spinelli standard (particularly in combination with the officers' observation of the appellant's suspicious conduct on the night in question), this information does not suggest the type of intimate knowledge of the appellant's activities that would provide the requisite basis of knowledge.

[5] We not that the pre-sentence report reflects that the appellant is sex feet tall and weighs two hundred and twenty-five (225) pounds.

IV. Reasonable Suspicion

Nevertheless, as noted earlier, the State on appeal has characterized the stop of the Ford Bronco as a brief investigative detention requiring only that the police possess a reasonable suspicion of criminal activity. An officer's reasonable suspicion must be based on specific and articulable facts indicating that a criminal offense has been or is about to be committed. Pulley, 863, S. W. 2d at 30; State v. Wilhoit, 962 S. W. 2d 482, 487 (Tenn. Crim. App. 1997). In short, the officer "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch," but the requisite level of suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence." Keith, 978 S. W. 2d at 867. Thus our supreme court has noted that

> [r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to shoe probable cause.

Bridges, 963 S. W. 2d at 492 (citing Alabama v. White, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990)). See also Simpson, 968 S. W. 2d at 781-782.

Accordingly, an officer may rely upon an informant's communication when forming reasonable suspicion to conduct an investigative stop of an automobile, Simpson, 968 S. W. 2d at 780. See also Adams v. Williams, 407 U. S. 143, 147, 92 S.Ct. 921, 1924 (1972), and the communication must carry sone indicia of reliability. Simpson, 968 S.W.2d at 781. Indeed, if

the tip is the *sole* basis of an investigative stop, the tip must satisfy to some extent both the veracity and basis of knowledge prongs of the Aguilar - Spinelli standard. Keith, 978 S. E. 2d at 866. However, in the context of determining reasonable suspicion rather than probable cause, courts will apply the Aguilar-Spinelli standard less strictly. Id.

Moreover, in the final analysis, the appropriate standard in determining reasonable suspicion as opposed to probable cause is the totality of the circumstances standard. Id. At 867. See also Simpson, 968 S. W. 2d 781-782; Bridges, 963, S. W. 2d at 492; Pulley, 863 S. W. 2d at 32-34. In applying this standard, a court may consider information including the officer's personal objective observations, information obtained from other police officers or agencies, information obtained from citizens, and pattern of operation of certain offenders. Keith, 978 S. W. 2d at 867. In considering this information, the court must evaluate its content, quality, and quantity and must consider "the rational inferences and deductions that a trained officer may draw from the facts and circumstances known to him — inferences and deductions that may will elude an untrained person." Id. Finally, the court must balance the gravity of the public concern at stake, the degree to which the police intrusion advances that concern, and the severity of the intrusion. Pulley, 863, S. W. 2d at 30. In sum, the failure of an informant's tip to satisfy one prong of the Aguilar - Spinelli test may be one circumstance among many that a reviewing court must consider in evaluation an officer's reasonable suspicion to conduct a brief investigatory detention.

Again, the informant's tip in this case, while clearly satisfying the veracity prong of the Aguilar - Spinelli standard, did not demonstrate the informant's basis of knowledge, nor was the basis of knowledge prong satisfied by independent police corroboration. Moreover, the informant did not report the crime at or near the time of its occurrence nor did the police

contemporaneously corroborate the information, justifying an inference that the information was an eyewitness. Keith 978 S.W.2d at 866. Nevertheless, the police officers in this case did not rely solely upon the informant's tip in forming the requisite reasonable suspicion, but also upon the personal knowledge of the appellant and their independent observations.

After examining the totality of the circumstances in this case, we conclude that the police officers possessed a reasonable suspicion that the appellant was delivering narcotics at the time of the investigative detention of the Ford Bronco. In so concluding, we consider all the following circumstances: the credibility of the informant' the substantial corroboration by police details in the informant's tip, reflecting the tip's reliability; the officers; knowledge of the appellant's past association with a major importer of marijuana into Davidson County;[6] the officer's observation of activity consistent with the removal of items from a box located in the appellant's rental car and the placement of those items in Mr. Deck's Ford Bronco, the very vehicle reportedly used by the appellant to deliver drugs; the appellant's careful examination of the Ford Bronco prior to driving the vehicle; the appellant's unusually slow rate of speed as he drove toward Davidson County; and the appellant's entry into Davidson County, the reported location of this drug transactions. Additionally, we consider the public interest warranting the brief detention of the Ford Bronco and the use of a drug detection dog.

Because the drug detection dog indicated the presence of narcotics in the Ford Bronco and in the red duffel bag, the

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[6] Police may consider a suspect's reputation with respect to the use or sale of illegal drugs in forming a reasonable suspicion rather than probable cause. State v. Kelly 948 S. W. 2d 757, 762 (Tenn. Crim. App. 1996).

police possessed probable cause to search the red duffel bag and the authority to do so pursuant to the automobile exception to the warrant requirement. Accordingly, the approximately ten pounds of marijuana discovered as a result thereof were admissible at the appellant's trial.

2. The Search of the Dodge Intrepid

We must next address the appellant's contention that the trial court erroneously admitted at the appellant's trial approximately fifty pounds of marijuana seized from the appellant's rented Dodge Intrepid following a warrantless search of the vehicle.[7] As previously noted, the police conducted the search soon after the appellant's arrest. At the time of the search, the Intrepid was parked in a visitor's parking space in the parking lot of Mr. Deck's apartment complex. The appellant argues that the police were required to obtain a warrant, because there existed no danger that the car would be driven off. The State asserts that the search of the Intrepid and the seizure of the marijuana were encompassed by the automobile exception to the warrant requirement.

As noted earlier, the rationale for the automobile exception is two-fold: (1) the impractibility of obtaining a search warrant in light of the inherent mobility of an automobile; and (2) the reduced expectation of privacy with respect to one's automobile. Carney, 471 U. S. at 386, 105 S. Ct. At 2066; Oppermen, 428 U. S. at 367, 96 S.Ct. at 3096. See also Leveye 796 S. W. 2d at 951. In Leveye, 79 S. W. 2d at 951, our supreme court noted that the United States Supreme Court in Carney 471 U. S. at 391, 393, 105 S. Ct. At 2069,

[7] Contrary to the State's suggestions in its brief, the fact that the appellant rented the Dodge Intrepid does not affect our analysis under the facts of this case.

2070, placed most emphasis upon the reduced expectation of privacy and relied upon an automobile's inherent mobility to create a conclusive presumption of exigency. The Court in Carney thereby expanded the automobile exception to include the warrantless search of an automobile in the absence of "any likelihood that the risk of delay to obtain a warrant is high" when there exist the following circumstances: the vehicle is parked in a public place; the search occurs soon after a crime; and there is probable cause to believe that the vehicle contained contraband. Leveye 796 S. W. 2d at 952 (citing Carney 471 U. S. at 392-393, 105 S. Ct. at 2070). The United States Court of Appeals for the Eight Circuit explained:

> While the mobility of automobile is part of the reasoning behind [the exception], the question is not...whether the car is likely to be driven off; the question is wether probable cause that contraband is within the vehicle supports a search within the scope that a warrant would have authorized. It is the characteristic mobility of all automobiles, not the relative mobility of a car in a given case, that gives rise to the ... standard [set forth in United States v. Rodd, 456 U. S. 798, 102 S. Ct. 2157, (1982),] which allows for warrantless searches when probable cause exists... Automobiles as a class, so to speak, are places where individuals have lesser expectations of privacy.

United States v. Perry, 925 F.2d 1077, 1081 n. 4 (8th Cir. 1991).

Our supreme court in Leveye adopted this approach to the automobile exception but noted that the United States Supreme Court might, in future cases, distinguish between vehicles parked in public places and elsewhere or "return to some particularized restriction on mobility." 796 S.W.2d at 952-953. Contrary to the appellant's argument in his brief, we do not believe that the United States Supreme Court's decision

in Pennsylvania v. LaBron, 518 U. S. 938, 116 S. Ct. 2485 (1996), signals a return to "some particularized restriction on mobility." Indeed the Supreme Court in LaBron explicitly rejected the notion that, in addition to probable cause, exigent circumstances other than the inherent mobility of an automobile must be present in order to justify a warrantless search of the vehicle. Id, at 940, 2486-2487.[8] Thus, the only question remaining is whether the location of the Dodge Intrepid in a visitor's space in the parking lot of Mr. Deck's apartment complex afforded the appellant a heightened expectation of privacy precluding application of the automobile exception.[9]

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[8] In support of his argument that there must exist a danger that the automobile will elude the grasp of police officers in order to justify a warrantless search, the appellant points in his brief to the Supreme Court's statement in LaBron, that "[i]f a car is readily mobile and probable cause exists to believe it contained contraband, the Fourth Amendment...permits police to search the vehicle without more. 116 S. Cr. At 2487. Suffice it to say that we do not believe the Supreme Court intended the phrase "readily mobile" to be synonymous with "imminently mobile" See Dyson ___U. S. at ____, 119 S. Ct. At 2014 ("the automobile expectation does not have a separate exigency requirement").

[9] Because an automobile is equally mobile whether parked in a "public place" or in a residential location, the effect of the location upon the application of the automobile exception must depend upon a suspect's expectation of privacy in the location. In LaBron, the Supreme Court upheld the constitutionality of the police officers' warrantless search of the defendant's truck when the police had probable cause to believe that the truck contained contraband. 518 U.S. at 940, 116 S.Ct. at 2487. The defendant had apparently gone to a farmhouse belonging to his former father-in-law in order to assist his ex-wife in conducting an illegal drug transaction. Id. at 393, 2486. At the time of the

We conclude that the appellant did not possess any expectation of privacy in the parking lot of Mr. Deck's apartment complex. There is not legitimate expectation of privacy in the common areas of an apartment complex or building. See, e. g., United States v. Brown, 169 F. 3d. 89, 92 (1st 1999), and United States v. Nohara, 3 F. 3d 1239, 1242, (9th Cir. 1993). See also State v. Matthews, 805 S. W. 2d. 776 781, (Tenn. Crim. App. 1990) ("society is not willing to accept an expectation of privacy in ... a parking lot which is provided for the use of tenants and their guests"). [10] Thus, in

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search, the defendant was under arrest and the truck was parked in the driveway of the farmhouse. Id. Additionally, the defendant's former father-in-law had consented to the officer's search of his property. Id. Implicit in the Supreme Court's decision was the conclusion that under these circumstances, the defendant did not possess a reasonable expectation of privacy in the driveway of the farmhouse. See Minnesota v. Carter 525, U. S. 83, ___, 119 S. Ct. 469, 473-474 (1998) (when defendants were visitors in another's home for a matter of hours and were essentially present for a business transaction, they possessed no expectation of privacy in the home); State v. Transou, 928 S. W. 2d. 949, 958, (Tenn. Crim. App. 1996) (a casual visitor does not have a reasonable expectation of privacy in the host's apartment); State v. Bartram, 925 S. W. 2d 227, 230, 231, (Tenn. 1996)(citing United States v. privacy, 415 U. S. 164, 171, 94 S. Ct. 988, 993 (1974)) (The consent of one who possesses common authority over the premises may violate another's expectation of privacy in the premises for purposes of constitutional prohibitions against unreasonable search and seizures).

[10] This is true whether one is a tenant or a guest. In other words, the appellant's status as a guest at Mr. Deck's apartment complex does not necessarily preclude a reasonable expectation

Commonwealth v. McCarthy, 705 N. E. 2d 1110, 875 (Mass. 1999), the Massachusetts Supreme Court concluded that a tenant did not have a legitimate expectation of privacy in a visitor's parking space located in the parking lot of his apartment building. The court explained:

> The parking space in questions is about twenty-five feet from the side entrance of the apartment building. Between the defendant's apartment and parking space presumably lay common hallways, entrances, and exits to other apartments units, and a shared parking lot open to both tenants and visitors of the building. To whatever extent the parking lot is enclosed, it is an enclosure encompassing a common area utilized by all the tenants and visitors of the building. The parking lot would also routinely be used by a wide range of individuals. On a daily basis not only would tenants and their guests pass through the lot, but so would delivery people, maintenance workers, and anyone else with business at the building. Furthermore,...[t]he record does not reveal any landscape or design features within the parking lot which would create a reasonable expectation of privacy in [the]...parking space.[11]

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of privacy. See, e. g., Minnesota v. Olson, 495, U. S. 91, 98, 100 S. Ct. 1684, 1689, (1990) ("[t]o hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share"). See also State v. Transou, 928 S. W. 2d 949, 958, (Tenn. Crim. App. 1996) ("[t]he fact that a person is an overnight guest in a residence or apartment, standing alone, is sufficient to clothe the guest with a legitimate expectation of privacy in the premises.

[11] Similarly, in the instant case, Officer McWright testified that the Dodge intrepid, in contrast to Mr. Deck's Ford Bronco, was

The police only required probable cause to believe that the Dodge Intrepid contained contraband in order to search the vehicle under the automobile exception to the warrant requirement. The appellant does not dispute, nor could he dispute, the police officers' information of the requisite probable cause. Accordingly, the trial court properly admitted the approximately fifty pounds of marijuana at the appellant's trial.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

Norma McGee Ogle, Judge

CONCUR:

David G. Hayes, Judge

Jerry L. Smith, Judge

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parked in "what I would call public parking."

IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE

Case Number: 96-C-1389
Attorney for State: Zimmerman
Attorney for Defendant: E. E. Edwards
[x] Retained [ ] Appointed [ ] Public Defender

State of Tennessee
vs.
Defendant Jose Roberto Ortiz
Date of Birth 7/23/43 Sex M Race H

* * *

JUDGMENT

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment.

On the 2nd day of December, 1997, the defendant:

Is found:

[x] guilty [ ] not guilty
[ ] jury verdict [ ] not guilty by reason of insanity
[ ] bench trial [ ] nolo contendere

Indictment: Class (please circle one): A B C D (E)
[x] Felony [ ] Misdemeanor
Amended Charge: _____
Offense date 2 / 23 / 96 County Davidson
Conviction offense Poss. of ½ oz. marijuana
TCA#: 39-17-417 Sentence-imposed date 1/15/98

JUDGMENT – Continued

* * *

[x] Sentence Reform Act of 1989

[ ] Mitigated 20%	[ ] Mitigated 30%
[x] Standard 30% Range1	[ ] Multiple 35% Range 2
[ ] Persistent Range 3	[ ] Career 60%
[ ] Violent 100%	[ ] Multiple Rapist
[ ] 1st Degree Murder	[ ] Child Rapist
[ ] Repeat Violent Offender	
[ ] School Zone	

* * *

Sentenced to:

* * *

[ ] County Jail
[x] Workhouse ____ Years 15 Months ___ Days
____ Hours _____ Week-ends
____ Periodic: (_____)

* * *

Court Ordered Fees and Fines

* * *

$ 3,000.00 FINE ASSESSED

JUDGMENT – Continued

* * *

Special Conditions:

15 months to serve
Bond increased to 15 months

Walter Kurtz	/s/ Walter Kurtz	1/15/98
Judge's Name	Judge's Signature	Date of Entry of Judgment

/s/ John Zimmerman	
Attorney for State Signature (Optional)	Defendant's Attorney/Signature (Optional)

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE
DIVISION II

STATE OF TENNESSEE	)
	)
VS.	) CASE NO. 96-C-1389
	)
JOSE ORTIZ	)

ORDER

This cause came to be heard on December 4, 1996 on a Motion to Suppress Evidence filed on September 25, 1996 and a Motion to Dismiss filed on September 30, 1996.

On August 1, 1996, the defendant, Jose Ortiz, was indicted by the Davidson County grand Jury for knowingly possessing with intent to deliver not less than ten (10) pounds, one gram (4536 grams) nor more than seventy (70) pounds (31,696 grams) of marijuana, a Schedule VI controlled substance in violation of T.C.A. Section 39-17-417. Defendant now moves the Court to Suppress all evidence seized from the warrantless search of a Ford Bronco he was driving on February 23, 1996. Defendant further moves the Court to Dismiss the Indictment or, alternatively, to vacate that portion of the indictment misstating the weight of the marijuana seized by police.

Initially, the defendant maintained in his Motion to Dismiss that the indictment charging him with possession with intent to deliver not less than ten (10) pounds, one gram, nor more than seventy (70) pounds of marijuana, misstates the actual weight of the marijuana found in the defendant's

possession. The defendant maintained that, according to T.B.I. calculations, the weight of the marijuana was slightly less than ten (10) pounds. At the December 4, 1996, the State, after recalculating the weight, agreed with the defendant that the weight stated in the indictment was incorrect, and the indictment was amended accordingly.

Next, the defendant moves to suppress the evidence seized by police on the basis that the police lacked probable cause to stop the ford Bronco driven by the defendant on February 23, 1996 and, further, that the police lacked probable cause to conduct a warrantless search of that vehicle. The State opposed the motion on the ground that the defendant lacked standing to challenge the stop and search of the vehicle.

Having heard and considered the testimony given at the hearing, the Court makes the following findings:

First, the Court finds that the defendant did have standing to contest the search of the vehicle in question, as it is apparent from the testimony that Mr. Deck, the owner of the vehicle, and the defendant had an understanding that the defendant could use the vehicle when it was available.

Second, the Court finds, on the basis of the testimony provided by Sergeant James McWright of the Metro Police Department, a police officer with twenty-one years of experience, including eight years as a member of the Drug task Force, that the police did in fact have probable cause, as defined in Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302 (1949), to stop and search the vehicle on the night in question. See Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970); Michigan v. Thomas, 458 U.S. 259, 102

S.Ct. 3027 (1982); United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982; California v. Carney, 471 U.S. 386; 105 S.Ct. 2066 (1985); State v. Parker, 525 S.W.2d 128 (Tenn. 1975); State v. Hughes, 544 S.W.2d 99 (Tenn. 1976), appeal after remand, 588 S.W.2d 296 (1979); Houston v. State, 593 S.W.2d 267 (Tenn. 1980); State v. Shaw, 603 S.W.2d 741 (Tenn. Cr. App. 1980); State v. Shrum, 643 S.W.2d 891 (Tenn. 1982).

For the aforementioned reason, it is hereby ORDERED, ADJUDGED, and DECREED that the indictment be amended to reflect the actual weight of the marijuana seized by the police and that the Motion to Suppress be denied.

Entered this 13 day of December, 1996

/s/_____

Judge J. Randall Wyatt, Jr.

Cc: Honorable John Zimmerman

Assistant District Attorney General

Honorable E. E. Edwards, III

Attorney for Defendant

SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
Sept. 25, 2000
Clerk of the Courts

STATE OF TENNESSEE	)
	)
v.	) **No. M1998-**
	) **00483-SC-R11-CD**
JOSE ROBERTO ORTIZ	)

ORDER

Upon consideration of Jose Roberto Ortiz's application for permission to appeal and the record before us, the application is denied.

PER CURIAM

UNITED STATES CONSTITUTION
AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

STATE OF TENNESSEE
DAVIDSON COUNTY

CRIMINAL COURT
NASHVILLE, TENN

Case No. 96-C-1889

STATE OF TENNESSEE

vs.

JOSE ORTIZ

(VOLUME I)

BEFORE:

The Honorable J. Randall Wyatt, Jr.,
Criminal Court in Nashville, Tennessee, on
December 4, 1996

APPEARANCES:

Mr. John Zimmerman
For the State

E. E. Edwards, III.
For the Defendant

* * *

[page 73]

Q Sergeant McWright, after you summoned the patrol officers to stop him, what happened next?

A The patrol cars pulled in, stopped him. And I approached the car and talked to Mr. Ortiz advised him - -

Q What did he say and what did you say?

A I advised him that we had reason to believe he was transporting marijuana and asked him for permission to search the car. He said, "I want to talk to my attorney." And that's all he ever said.

Q Okay. What happened then?

A We called the drug K-9 to the scene. Officer Ron Sloan was close. He run the dog on the car, and the dog indicated on the - - on the tote bag in the back seat of the car, at which time we removed it, checked it, and there was almost ten pounds, five grams short of ten pounds of marijuana in it.

Q Inside the tote bag?

A Yes, sir.

Q There was also - - appeared to be in the pictures that Mr. Edwards and I saw that haven't been shown to the Court yet, appeared to be a flannel shirt of some type in there. Did you see that flannel shirt?

A Yes, sir. It was - - when I went up next to the Bronco, after the patrol cars had stopped him you could see the shirt over the - - in other words, it was completely covering the tote bag that Officer Rigsby observed him place in the car.

Q So there was a shirt that was covered and concealing the tote bag underneath it?

A That's correct.

Q And how was the marijuana packaged?

A It was in approximately one pound heat sealed, shrunk - - I don't know exactly how it - - it was - - the packages are like shrink wrapped almost in the - - in the one pound. Like I said, I've never seen any just exactly like that.

Q Not just heat sealed but also shrunk wrapped?

A Yes, sir.

STATE OF TENNESSEE
DAVIDSON COUNTY,

CIRCUIT COURT
NASHVILLE, TENN

Case No. 96-C-1889

STATE OF TENNESSEE

v.

JOSE ORTIZ

(VOLUME II)

BEFORE:

The Honorable Walter C. Kurtz,
Circuit Court in Nashville, Tennessee

APPEARANCES:

Mr. John Zimmerman
For the State

E. E. Edwards, III.
For the Defendant

* * *

[page 98]

Q And were you present when they stopped the vehicle?

A Yes, sir, I was.

Q Tell the jury what happened.

A We got Mr. Ortiz, checked his license, got him - -

Q Where did it show that he was from?

A He was from - - I believe it was Robstown or Beeville, Texas. I can't recall which - - it was from the border area of Texas.

Q And after you checked his license, then what did you do?

A Called a drug K-9 to the scene, Officer Ron Sloan responded with him to do a search of the vehicle.

Q And then what happened?

A Based on an indication by the drug dog, the dog alerted on the red bag that was in the back- - the backseat of the Bronco, I opened the bag and observed 10 one - - approximately one-pound bags of marijuana. They were heat-sealed and shrink-wrapped type, but it's the first ones I had seen that particular way.

Q Okay. Let me take you back - - step back just a minute, please. Before the drug dog was called - - or when the drug dog was called, did you see where there was a bag located in the vehicle?

A Yes, sir.

Q Where was it?

A Well, you couldn't actually see the bag. There was like a towel or blanket, something over the bad.

Q Hiding the bag?

A Yes, sir.